No. 474

In the Supreme Court of the United States

OCTOBER TERM, 1950

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
PETITIONERS,
v.
CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

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CITATIONS

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1950 (R. 96). A petition for modification of the opinion and judgment, filed on June 30, 1950 (R. 103–112), was denied on October

2, 1950 (R. 100). The petition for a writ of certiorari in No. 474 was filed on December 29, 1950. Certiorari was granted on February 26, 1950 (R. 114). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Civil Service Commission's "Retention Preference Regulations" promulgated pursuant to Section 12 of the Veterans' Preference Act of 1944 violate that section by providing that, in a reduction-in-force, non-veterans with the equivalent of classified civil-service status are to be retained in preference to veterans holding war service appointments limited to the duration of the war and six months thereafter.

2. Whether, despite the terms of their appointments and the Regulations of the Board of Legal Examiners in effect at the time of those appointments, petitioners Elder and Furman acquired classified civil-service status.

STATUTES AND REGULATIONS INVOLVED

Sections 12, 14, and 18 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390, 391, as amended, 5 U. S. C. and 5 U. S. C., Supp. III, §§ 861, 863 and 867), Section 4 of the Act of August 23, 1912 (37 Stat. 413, 5 U. S. C. 1934 ed. § 648) and pertinent portions of the Regulations of the Board of Legal Examiners (8 F. R. 5207, 5 CFR Cum. Supp. §§ 17.1 *et seq.*), of Executive Order No. 8743 (6 F. R. 2117, 3 CFR Cum. Supp. 927) and of

Executive Order No. 9063 (7 F. R. 1075, 3 CFR Cum. Supp. 1091) are set forth in the Appendix, *infra*, pp. 43–56.

Pertinent portions of the Civil Service Commission "Retention Preference Regulations" (5 CFR (1949) §§ 20.3 and 20.8) are set forth, *infra*, pp. 7–8, and in the Appendix to our brief in No. 473 at pp. 36–38.

STATEMENT

The statement is set forth in the brief for the Secretary of Agriculture in No. 473. The Secretary of Agriculture, petitioner in No. 473 and respondent in No. 474, is referred to as "the Secretary" in both this brief and that in No. 474, and Messrs. Elder and Furman, petitioners in No. 474 and respondents in No. 473, are referred to as "respondents" in both briefs.

SUMMARY OF ARGUMENT

I

The Civil Service Commission's "Retention Preference Regulations," in providing that non-veterans with the equivalent of competitive status shall, in a reduction-in-force, be retained in preference to veterans holding temporary appointments, are entirely in accord with the mandate of Section 12 of the Veterans' Preference Act of 1944.

The Commission's regulations in effect at the time that Act was passed, and for some time

before, were substantially the same as those under attack here. There is no evidence in the legislative history that Congress intended to give to veterans greater preference in retention than was afforded under those regulations; on the contrary, all the available evidence points in the other direction. Nor does the language of Section 12 compel any such reading as respondents advance; it expressly provides that "due effect" shall be given to "tenure of employment, military preference, length of service, and efficiency ratings," and the proviso, on which respondents rely heavily, merely provides for preference to all other "competing employees." In the history of the civil service, permanent employees have not been considered to compete with temporary employees. Moreover, Section 12 was adopted as drafted by the Civil Service Commission and the Commission was expressly empowered to regulate veterans' preference in reductions-in-force. Respondents have completely failed to sustain the burden of showing that the regulations are plainly erroneous, and they must, therefore, be upheld.

Similarly, the proviso to Section 4 of the Act of August 23, 1912, dealing only with permanent, classified employees—prohibiting the discharge or dropping, in a reduction-in-force, of any "honorably discharged soldier or sailor whose record in said department is rated good"—cannot now be interpreted to grant greater preference rights than it was interpreted to give at the time it

was superseded by the Veterans' Preference Act of 1944. It had never been interpreted to grant temporary veteran employees preference in retention over non-veterans holding permanent appointments.

II

If the retention regulations are valid, there can be no serious question that respondents were properly separated in accordance with those regulations, which place them in a group subordinate to permanent employees. Their claim to such permanent status is insubstantial. The war service regulations governing appointments to attorney positions at the time of respondents' appointments (in July and August 1943) specifically prohibited the acquisition of competitive status by reason of those appointments. Respondents' appointments were in fact limited to the duration of the war and six months thereafter. These war service appointment regulations were undoubtedly validly issued under the prevailing statutes and executive orders.

III

Other arguments made by respondents with respect to the validity of their separation are wholly without merit.

ARGUMENT

In our brief in No. 473 we show that the court below was in error insofar as it held that respondent's *reemployment* rights had been violated. We

are concerned here only with respondents' contentions that they were improperly separated. We contend that the Civil Service regulations governing reductions-in-force are valid and that respondents were separated in accordance with those regulations. We submit, therefore, that the judgment below, insofar as it upheld respondents' separation, should be affirmed.

I

THE RETENTION PREFERENCE REGULATIONS OF THE CIVIL SERVICE COMMISSION AFFORD VETERANS ALL THE PREFERENCE IN RETENTION REQUIRED BY SECTION 12 OF THE VETERANS' PREFERENCE ACT OF 1944 AND ARE VALID

Section 12 of the Veterans' Preference Act of 1944 provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* * * * That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

Pursuant to Section 12, the Civil Service Commission promulgated its "Retention Preference Regulations" (12 F. R. 2850). Those regulations provide, in general, that, for purposes of determining the order in which separation shall be effected, employees shall be divided into three groups—A, B and C—according to tenure of employment. Group A, which has the highest retention priority, is composed of employees with competitive status or, in the case of positions such as that of attorney which are "excepted" from examination requirements, who hold appointments without time limitation. Group B, which has the second highest priority, is composed of employees without competitive status or whose appointments are limited to the duration of the war and six months. Group C has the lowest priority and is composed of employees whose appointments are limited in time to one year or less. Within each group employees are further divided into sub-groups according to veterans' preference and efficiency rating. Thus, sub-groups A–1, B–1 and C–1 are composed of employees with veterans' preference and efficiency ratings of "good" or better, and sub-groups A–2, B–2, and C–2 are composed of employees without veterans' preference with "good" or better efficiency ratings.[1]

[1] The Civil Service Commission "Retention Preference Regulations for use in Reduction in Force," 12 F. R. 2850, § 20.3 provided: "For the purpose of determining relative retention preference in reductions-in-force, employees shall be

In accordance with those regulations, respondents were classified in Group B, as employees without competitive status holding appointments limited to the duration of the war and six months.

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classified according to tenure of employment in competitive retention groups and subgroups as follows:

"Group A. All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

"A–1 Plus during one-year period after return to duty, as required by law.

"A–1 With veteran preference unless efficiency rating is less than 'Good'.

"A–2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *

"Group B. All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

"B–1 With veteran preference unless efficiency rating is less than 'Good'.

"B–2 Without veteran preference unless efficiency rating is less than 'Good'."

* * * * *

The definitions of Groups A and B were modified, in respects not material here, on July 4, 1947 (14 F. R. 4365), and, as amended, are set forth in the Appendix to our brief in No. 473.

They were further classified in sub-group B–1 (R. 44) as veterans with efficiency ratings of at least "good."

Respondents contend that Section 12 is an absolute command that all veterans with efficiency ratings of at least "good" be retained in preference to all other non-veterans holding similar positions and that the Civil Service Commission regulations are invalid insofar as they give any non-veterans a higher position on the retention register than any veteran, holding a similar position, with an efficiency rating of "good" or better. We believe, however, that Section 12 does not express such a command and that all evidence in its legislative history points to the conclusion that Congress did not intend to prefer temporary employees with veterans' preference over permanent non-veteran employees. On the contrary, the Commission's regulations are well within the discretion committed to it by Section 12 and must therefore be upheld.

A. LEGISLATIVE HISTORY AND TERMS OF SECTION 12

1. The Veterans' Preference Act of 1944 was intended, in large part, as a codification of existing Executive orders and Civil Service Commission regulations. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3, Sen. Rep. 907, 78th Cong., 2d Sess., p. 1, 90 Cong. Rec. 3505. The Civil Service Regulations in effect at the time the Veterans' Preference Act was passed (8 F. R. 10921,

5 CFR (Supp. 1943) §§ 12.301–12.313) and for some twelve years before that, gave veterans substantially the same preference in retention as is afforded by the regulations in issue here. Those regulations drew the same distinction between permanent employees and those with limited tenures. See *Hilton* v. *Sullivan*, 334 U. S. 323, at note 10, and see *infra*, pp. 23–24. The Act was, it is true, intended to strengthen veterans' preference in several respects, see *Hilton* v. *Sullivan*, *supra*, at p. 337, but each enlargement of veterans' rights was carefully noted in the legislative history.[2]

There is no evidence in that history that Congress intended to change existing law to eliminate the preference of permanent over temporary employees. The sole change in the existing law of retention preference called to the attention of Congress was concerned with veterans' preference upon the transfer of functions from one agency to another.[3] H. Rep. No. 1289, 78th Cong., 2d

[2] In explaining the bill on the floor of the House, Mr. Ramspeck, Chairman of the Civil Service Committee said (90 Cong. Rec. 3505): "This Act does not make a great many changes in the present veterans' preference, which exists largely by Executive order, but it is important, I think, that those Executive orders be given legislative status by the Congress.

"It does give some additional strength to the veterans' preference, by strengthening the Executive orders now in existence."

[3] In the statement referred to in the preceding footnote, Congressman Ramspeck enumerated the chief amendments

Sess., p. 4, Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 3, Hearings Before the Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess., pp. 9–10, 29.[4] In particular, the proviso of Section 12 providing for preference of veterans with "good" efficiency ratings over "all other competing employees" (*supra*, p. 6)—on which respondents rely heavily (Elder Br., pp. 15–29)—was not regarded as changing existing law. In discussing that proviso before the Senate Committee on Civil Service,

made by the proposed Act to existing law, but did not mention retention preference.

[4] At those hearings, Representative Starnes, the author of the bill, in discussing Section 12, said (pp. 9–10):

"One further broadening item in this provision of the act, in section 12, states [reading]:

"That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

"* * * That is one principle the veterans' organizations have fought for most vigorously. Oftentimes they have found agencies which have transferred or abolished their functions entirely and a new agency was set up in its place. The new agency then would leave the veterans in the cold and go out into the open labor market and recruit new appointees. It is a device which the veterans claim has been used against them to eliminate them from Government appointments, by simply abolishing the function or transfer the function and leaving the personnel out in the cold. That is one practice of ignoring veterans' preference."

Mr. Arthur S. Flemming, Civil Service Commissioner, said (Hearings, *supra*, at p. 27):

> That proviso is substantially the same as a law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923.[5]

Certainly, the understanding of the Civil Service Commission at that time was that the statute would leave retention preference substantially as it was under existing regulations. At the Senate Hearings, Mr. Flemming said (Hearings, *supra*, at p. 27):

> Section 12 is an important section because it deals with the problem of reduction in force in the Federal service.
>
> You will note the first part of the law provides [reading]:
>
> "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings."
>
> I might say that our existing reduction-

[5] On the 1912 Act, see *infra*, pp. 20–26.

in-force regulations are in harmony with that.[6]

2. Moreover, it is fair to assume from the legislative history that those connected with the legislation understood that temporary employees, and especially war service appointees like respondents, were to be preferred only over others of similar tenure. During his testimony before the Senate Civil Service Committee Mr. Flemming, Civil Service Commissioner, twice referred to the problem of war-service appointees in a manner suggesting that such employees would not have retention rights superior to those of permanent civil servants.[7] Of even greater signifi-

[6] At the time of the Senate Hearings, all the relevant portions of Section 12, including the proviso on which respondents rely, were the same as finally enacted.

[7] At p. 20 of the Hearings, in response to a question by the Chairman of the Committee as to how many people would be forced out of government jobs by returning veterans, Mr. Flemming said:

"* * * of course persons who left any of these jobs and entered the armed forces are entitled to come back to them, but a person who did not leave one of these jobs, but who has gone into the armed forces and then applies for one of these jobs, is not given the right under this act to force existing personnel out. Positions now filled by war service appointees, however, will become vacant and could only be filled as a result of a competitive examination."

* * * * *

And again, at p. 21, he said:

"* * * Since March 16, 1942, all persons recruited for the Federal service have been given war service appointments, appointments for the duration of the war and a period

cance, in view of the considerable part played by the veterans' organiaztions in the drafting of the bill,[8] is a proposed, but unadopted, amendment offered by the representatives of the Disabled American Veterans to give permanent status to disabled war-service preference eligibles (Hearings, *supra,* at pp. 46–47):

* * * * *

> Although there was mutual agreement among the three veterans' organizations concerning all of the provisions of the bill, as passed by the House, except for the La Follette amendments, I did state to the others that I intended to propose, if I had an opportunity, for the consideration of this committee, that all persons who have a 10-point civil-service preference and who hold war-service appointments should be given a permanent civil-service status. To that end I recommend that there be added the following language at the end of section 8 on page 7 [reading]:

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of 6 months thereafter, and such of these positions as remain in the post-war period will be thrown open to competition and the incumbents, if they desire to stay in, will have to compete with returning veterans. Whether they remain or not depends upon whether or not they come out on top in that competition."

[8] Throughout the legislative history of the Act it was stressed that H. R. 4115 had the endorsement of the Civil Service Commission and the major veterans' organizations. H. Rep. No. 1289, 78th Cong., 2d Sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d Sess., p. 1; Hearings, *supra*, at p. 8; 90 Cong. Rec. 3503.

"Any person included in section 2 (1) who holds a war-service appointment in any Federal agency is hereby extended the status of a permanent employee."

The reason for that is that probably several thousand, but not too many thousand, service-connected disabled veterans, both of World War I and World War II, have acquired war-service appointments that last for the period of the war and 6 months thereafter, who will be considered to have been only temporary employees and whose appointments would therefore be terminated 6 months following the conclusion of this war. Most of these service-connected disabled veterans should in any event have been granted a preference and having been on the job anywhere from several months to several years and presumably having established their qualifications for the job, we think they ought to be given a permanent civil-service status.

* * * * *

Had the veterans' organizations understood the Act to mean what respondents say it does—that temporary veteran employees are protected from separation so long as any permanent non-veteran is still on the job—such an amendment would have been largely purposeless.

3. It is also important to note that the genesis of Section 12 indicates that a special status is to be accorded the Commission's views of the statute's meaning. In the 76th Congress, two bills, spon-

sored by veterans organizations, were introduced which disregarded tenure of employment, length of service, and efficiency ratings, and provided that in the case of a reduction-in-force no preference eligible was to be dismissed while a nonveteran doing similar work was retained.[9] Neither of those bills became law. Instead, in the bill which, with the endorsement of the Civil Service Commission and all the major veterans organizations, became the Veterans' Preference Act of 1944—H. R. 4115, 78th Congress—the language of the section governing reductions-in-force was that proposed by the Civil Service Commission. See H. Rep. No. 1289, 78th Cong., 2d Sess., p. 6.[10]

[9] H. R. 5101, 76th Congress, 1st Sess., endorsed by the American Legion, provided:

"SEC. 13. In the event of reductions in personnel being made in any establishment, agency, bureau, administration, project, or department, temporary or permanent, hereinbefore referred to, under the classified civil service or otherwise, no preference eligible shall be dropped, discharged, furloughed, or reduced in rank or compensation while a nonpreference eligible engaged in similar work is retained upon the former basis, except discharges made in pursuance of charges as provided in section 14 hereof."

H. R. 5147, 76th Congress, 1st Sess., endorsed by the Veterans of Foreign Wars, provided:

"SEC. 10. That when reductions are being made in any agency or project of the Federal Government, or of the District of Columbia, no preference employee shall be dismissed, suspended, furloughed, or reduced in rank or compensation while a nonveteran engaged in similar work is retained therein: * * *"

[10] The language was originally proposed in a letter of January 31, 1944, from the Civil Service Commission to Representative Starnes, author of H. R. 4115.

It would be strange to conclude, as one must if respondents' position is upheld, that the Commission, having proposed the language of Section 12 to Congress in the light of the previous proposal by the veterans' organizations, and having urged its adoption, had immediately after the passage of the Act misconstrued it in this important respect. On the contrary, the contemporary understanding of the Commission expressed in its subsequent regulations must be awarded great weight in any attempt to divine Congressional intent and purpose. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Billings* v. *Truesdell*, 321 U. S. 542, 552, 553.

The complete absence in the legislative history of any suggestion of support for respondents' contention is more than usually significant in view of the radical nature of the change they insist was made. Respondents are, after all, asserting the novel proposition that temporary employees, whose appointments may have been limited to less than a year, must be retained in preference to non-veteran employees with unlimited tenure. It cannot be disputed that such preference has never existed under the civil service laws; the distinction between permanent and temporary employees has always been an integral part of those laws. *Supra*, pp. 9–10, *infra*, pp. 21–24. We submit that the clearest kind of statutory directive would be needed before such traditional practices could be overturned.

4. But nothing in the wording of Section 12 compels the conclusion that, despite the administrative and legislative backgroimd we have set forth, Congress did command the Civil Service Commission to prefer veterans over non-veterans regardless of tenure of employment. The mandate to the Commission was simply that its regulations governing the release of "competing employees" give "due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, * * * That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *." *Supra*, p. 6.

This would seem to be the antithesis of such a command. For it can hardly be said that the Commission does not give *due effect* to military preference. Veterans with efficiency ratings of at least "good" are absolutely preferred over non-veterans regardless of the length of service or efficiency ratings of the latter. Veterans with permanent appointments and "good" ratings are preferred over all non-veterans. The only restriction placed on preference is that temporary employees cannot displace permanent non-veterans. The *proviso* does not give veterans with "good" ratings absolute preference over every other employee but only over "*competing employees.*" On its face, this phrasing, in view of the requirement that "due effect" be given "to

tenure of employment," certainly authorizes a ruling that men with permanent appointments are not to be considered as competitors of temporary employees. In the light of civil service history prior to the Act (*supra*, pp. 9–10; *infra*, pp. 21–24), the propriety of this reading can hardly be questioned.

B. THE COMMISSION'S POWER TO IMPLEMENT SECTION 12

Even if the foregoing part of our argument should not convince the Court that the Commission's "Retention Preference Regulations" are the only acceptable interpretation of Section 12 of the Veterans' Preference Act, we submit that those regulations are clearly within the discretion given to the Commission by Section 12 and, as the reasonable regulations of the agency charged by Congress with implementing the Act, must be upheld. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 502; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102–103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414.

Section 14 of the Veterans Preference Act authorizes the Civil Service Commission "to promulgate appropriate rules and regulations for the administration and enforcement of [the] Act." That Congress particularly intended the Commission to have broad rule-making power with respect to reductions-in-force was manifested by the fact that, instead of relying on Section 14 to give that power, it specifically provided in Section 12, the

very next section, that reductions-in-force should be carried on "in accordance with Civil Service Commission regulations." This gives "added reasons why interpretations of the Act and regulations under it should not be overruled by the courts unless clearly contrary to the will of Congress." *Commissioner* v. *South Texas Co.*, 333 U. S. at 503.

The legislative history, civil service practices, and other factors discussed above (pp. 9–19; and see *infra*, pp. 20–26) demonstrate that respondents cannot sustain their burden of showing that the regulations are unreasonable "or clearly contrary to the will of Congress." There is no support for their position in the Act's legislative history, and, against the legislative and administrative background, the argument as to the asserted "plain language" of Section 12 (Elder Br. p. 19) is clearly insufficient.

C. THE 1912 ACT

Respondents also rely heavily on the proviso to Section 4 of the Act of August 23, 1912 (*infra*, pp. 45–46), and on the language used by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 336, with respect to that statute. (Elder Br., pp. 29–33).[11] We

[11] The Court said (334 U. S. at 336):

"There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good.' Length of service in no way qualified the preference given the veteran."

do not believe that the Court intended its language to cover the situation now before it, and any reliance in this case on the 1912 Act, either as independent legislation or as indicating the reach of Section 12, is misplaced. The proviso to Section 4 had long been interpreted in the same fashion as its successor, Section 12, has now been construed by the Civil Service Commission; and it has no standing as independent legislation, having been superseded by the 1944 Act (H. Rep. No. 1289, 78th Cong., 2d Sess., p. 7).

1. Section 4 of the Act of August 23, 1912, was primarily concerned with the establishment of efficiency ratings in the classified civil service in the District of Columbia. It was accordingly first interpreted to apply only to such positions. Executive Order No. 3567, October 24, 1921. Executive Order No. 3801, of March 3, 1923, extended the preference to the classified service generally.[12] Executive Order No. 4240 of June 4, 1925[13] and Executive Order 5068 of March 2,

[12] E. O. 3801 amended Civil Service Rule 12, pertaining to reductions-in-force, by adding Section 5:

"* * * In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

[13] The Executive Order provided in part:

"* * * the following rules are hereby prescribed to govern the selection of employees for demotion or separation

1929 [14] provided that veterans with efficiency ratings of "good" were to be retained in preference to competing employees. In 1936, retention preference was extended to all agencies of the federal government. Departmental Circular No. 146, U. S. Civil Service Commission, October 22, 1936.[15]

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from the departmental service on account of reduction in force.

"*Employees eligible for military preference*

"1 Executive Order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition."

[14] The Executive order amended Civil Service Rule 12, Section 5, to read:

"In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service."

[15] The circular read:

"The President of the United States has informed the Civil Service Commission that it is his desire that in making reductions of force the civil-service rules be applied by all agencies which are to be on a permanent basis. The provisions of section 5 of civil-service rule XII should, therefore, be

As early as 1932, the Civil Service Commission prescribed that in a reduction-in-force employees were to be separated in inverse order of their tenure of employment: first, temporary employees, next, probational employees, and, lastly, permanent employees. For purposes of applying the retention preference regulation "only those employees in the class under consideration (temporary, probational, or permanent) who are engaged in the same line of work [were] to be considered as in competition with each other." Minute of the Civil Service Commission, August 11, 1932.[16] The rule remained the same at all times prior to the passage of the Veterans' Preference Act of 1944.[17]

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applied regardless of the place of employment, and should also be applied in the regular branches of the Government in making reductions in force in excepted positions."

[16] Civil Service Commission, Acts, Rules and Regulations (As Amended to September 15, 1934) p. 54:

"*Reduction of force; order to be followed.*—Departments and independent offices shall follow the order herein given in making dismissals from the classified service because of reduction in force: (1) All temporary employees; (2) all probational employees; (3) permanent employees. 'In making a reduction in force, only those employees in the class under consideration (temporary, probational, or permanent) who are engaged in the same line of work are to be considered as in competition with each other. The provisions of sec. 5 of rule XII apply to reductions in each of these three classes when the reduction does not require the dismissal of all employees in any particular class' (minute of Commission, Aug. 11, 1932)."

[17] See 1939 CSA 76, 1941 CSA 108; 5 CFR, Supp. 1943, § 12.304.

Thus, at no time prior to 1944 had the proviso of Section 4 of the Act of August 23, 1912, been interpreted to grant the kind of preference for which respondents contend. Rather, for at least twelve years prior to 1944 the Civil Service Commission rules were substantially identical to the regulations under attack here. Veterans with temporary appointments were not given preference over non-veterans with superior, permanent status.

The Court's discussion of the 1912 Act in the *Hilton* case does not conflict with this interpretation. The issue there involved "length of service" and did not touch on tenure or type of employment. The Court limited its consideration to "the treatment of permanent tenure civil service employees" (334 U. S. at 325), and all the employees, veterans and non-veterans, concerned in that case were classified in retention group A—"permanent employees". 334 U. S. at 326. The opinion pointed out that under the 1912 Act, as written and as interpreted in practice, "length of service in no way qualified the preference given the veteran" (334 U. S. at 336–337), but it did not make or intimate a holding that the same would be true of tenure of employment.[18] As we have shown

[18] The Court noted (334 U. S. at 337, fn. 10) that, at the time of the passage of the 1944 Act, the Civil Service Commission regulations provided that "all permanent employees, regardless of veterans' preference and of efficiency rating, [should enjoy] priority over all employees with limited tenures."

(*supra*, pp. 23–24), the prior consistent practice under the 1912 Act was to give superior retention status to permanent employees over non-permanent workers, just as it was to disregard years of service as between veteran and non-veteran permanent employees.

2. Section 18 of the 1944 Act (*infra*, p. 46) saved to veterans "any rights heretofore granted to, or possessed by [them], under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." Respondents apparently claim (Elder Br., p. 31) that this savings-clause preserves the 1912 statute, as they construe it, as a separate and independent source of retention benefits. But Section 18 preserved veterans' rights under the proviso of the 1912 Act only as it had been interpreted by Executive Order and Civil Service Commission regulations prior to 1944 (see Hearings, *supra*, p. 11, at p. 27), and respondents cannot now ask the courts to give it a fresh interpretation. In any event, there is no reason to reject, at respondents' behest, the long-standing executive construction of the 1912 Act and, in doing so, to grant them unique preference rights simply because they happened to be employed by the Government a year prior to the passage of the 1944 statute.

For the future, the 1912 Act has no role at all. As noted above (*supra*, p. 21), the proviso was specifically superseded by the 1944 Act. If there

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could have been any doubt on that point, it was removed when, in 1950, the 1912 Act was specifically repealed by Public Law 873, 81st Cong., 2d Sess. The repealing Act, like Section 4 of the 1912 Act, was concerned with establishment of efficiency ratings. There is no evidence in the legislative history that the repeal was considered to have any effect on veterans' preference legislation. We cannot suppose that Congress, so constantly concerned with veterans' preference, would have taken away preference rights in such cavalier fashion. They must, we submit, have assumed that all rights granted by the 1912 Act were fully protected by the Veterans' Preference Act of 1944.

II

RESPONDENTS NEVER ACQUIRED COMPETITIVE STATUS AND WERE PROPERLY CLASSIFIED IN SUB-GROUP B–1 ON THE RETENTION REGISTER

Respondents contend that even if the Civil Service Commission "Retention Preference Regulations" are valid, they were, nevertheless, improperly separated. They argue that, contrary to the holdings of both courts below, they had acquired competitive status[19] on the completion

[19] Executive Order No. 9830 of February 24, 1947 (12 F. R. 1259, 3 CFR, Supp. 1947, 107) defined competitive status and competitive service as follows:

Part II—Civil Service Rules

* * * * * *

"§ 1.1 * * * As used in these Rules, the words 'competitive service' shall have the same meaning as the words 'classified service,' or 'classified (competitive) service,' or

of the probationary periods of their appointments,[20] and that, under the regulations, they should have been classified in sub-group A–1 on the retention register and have been retained in preference to all A–2 attorneys.[21]

'classified civil service' as defined in existing statutes and Executive orders. The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom under statute or Executive order, and all positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject thereto by statute. Whenever there is a doubt the Commission shall determine whether a position is in the competitive service.

"(b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. A competitive status shall mean a status which permits a person to be promoted, transferred, reassigned, and reinstated to positions in the competitive service without competitive examination, subject to the conditions prescribed by the Civil Service Rules and Regulations for such noncompetitive actions. A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or the Civil Service Rules."

[20] Respondents seem to attach independent significance to the fact that their appointments were probational for a year and that they successfully completed the probationary period. But all war-service attorney appointments were made "subject to the satisfactory completion of a trial period of one year." Board of Legal Examiners Regulations, § 17.1 (g) (8 F. R. 5208). Respondents' successful completion of that period did not confer competitive status on them, but, on the contrary, was a condition precedent to their continued employment for the period of the emergency.

[21] The only point urged by respondents in their petition in No. 474 was that the regulations were invalid. The contention that they had acquired competitive status, and their

The short answer to that contention is that the regulations in effect at the time of their appointments (Regulations of the Board of Legal Examiners, § 17.1 (g)) specifically prohibited the acquisition of competitive status by reason of such appointments and that their appointments

other contentions discussed in Part III below, are not properly before this Court in support of respondents' request that the judgment below be reversed. Since, however, all these points can be urged in support of the judgment against the Secretary, it is necessary that we answer them.

Respondents implied in their complaints (R. 53-54) that the reduction-in-force of which their separation was a part was not made in good faith, and that it was in reality a device for avoiding their veterans' preference. They have not raised that question here nor did they raise it in the court below. We should like, however, to call to the Court's attention the facts concerning this reduction-in-force:

It was part of a drastic retrenchment by the Office of the Solicitor, Department of Agriculture, during 1947, necessitated by lack of funds. In February, 1947, seventeen attorneys had been separated because the Office did not then have sufficient funds to meet the salary raises resulting from the Pay Act of 1946. Subsequently, in the 1948 Appropriation Bill the House of Representatives cut the Budget of the Solicitor's Office by $500,000. Separation notices were then sent to seventy-five attorneys, including respondents. The separations were to be effective at the end of the fiscal year, June 30, 1947, but in order to preserve as much of the 1948 appropriation as possible for 1948 operations the separated attorneys were placed on annual leave on June 6. Pending Senate action on the Bill the attorneys were continued on the rolls beyond June 30, in the hope that the Senate might restore the cut and the attorneys could be put back to work without prejudice to their employment status (R. 40). The Senate restored $100,000 of the cut and the separation notices were rescinded as to all but forty-three attorneys. As to them, the separations were made effective (R. 46). The total number

were, in fact, limited to "the duration of the war and six months thereafter" (R. 43).

Respondents, however, pursue a tortuous path through the history of the regulations of the Board of Legal Examiners, and, relying at each stage on a meticulously literal reading of isolated portions of the relevant documents, conclude that, despite the regulations and the terms of their appointments, they somehow acquired competitive status. We feel it appropriate, therefore, to set out at some length the evolution of the regulations in effect at the time of respondent's appointments.

A. 1. Prior to 1941 most attorney positions were filled without regard to Civil Service lists. In 1940, Congress, in the so-called Ramspeck Act (54 Stat. 1211, 5 U. S. C. § 631a) "authorized" the President "by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government." Pursuant to that authorization, the

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of attorneys separated in 1947 were sixty. An additional thirty were downgraded. In addition, the Solicitor's Office was substantially reorganized; in the course of that reorganization, eight ranking Washington positions, two regional offices and seven side offices were abolished. Hearings before a Subcommittee of the Senate Appropriations Committee on the 1948 Department of Agriculture Appropriation Bill, 80th Cong., 1st Sess., pp. 108–110; Hearings before a Subcommittee of the House Appropriations Committee on the 1949 Department of Agriculture Appropriations Bill, 80th Cong., 2d Sess., pp. 252, 258–260.

President, by Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117, 3 CFR Cum. Supp. 927) *infra*, pp. 51–55, covered a number of positions, including most attorney positions, into the classified civil service.

By Section 3 of Executive Order 8743, there was "created in the Civil Service Commission * * * a board to be known as the Board of Legal Examiners" which was given the duty of promoting "the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service." The Board was charged with responsibility "in consultation with the Civil Service Commission" of determining regulations and procedures governing the employment of attorneys. The Civil Service Commission was directed to establish, in the manner determined by the Board, registers of eligibles from which attorney positions were to be filled. Subsection 3 (i) authorized, and prescribed procedures for, the filling of attorney positions vacant after June 30, 1941 "before available registers [were] established."

On June 27, 1941, the Board of Legal Examiners promulgated its first regulations as Part 17 of the Regulations of the Civil Service Commission (6 F. R. 3577). Section 17.1, "Appointments from existing registers," provided that pending establishment of registers under E. O. 8743, appointments to attorney positions could be made from existing registers of the Civil Service Com-

mission. Section 17.2, entitled "Appointments pending registers," provided that, with the prior approval of the Civil Service Commission, appointments to attorney positions could be made without regard to E. O. 8743, provided that persons so appointed would subsequently be required to pass the examinations to be prescribed by the Board. On August 6, 1941, Section 17.1 was revoked and Section 17.2 was amended (6 F. R. 4091). As amended, Section 17.2 was entitled "Procedure prior to the establishment of registers"; it provided that appointments without prior examination could be made only in "cases of special emergency" and that all other appointees must first have passed non-competitive examinations. It prescribed the type of examination to be given [22] and the minimum requirements for appointments in various grades.

2. After our entrance into World War II, the President, by Executive Order No. 9063, dated February 16, 1942, (7 F. R. 1075, 3 CFR Cum. Supp. 1091) (*infra*, pp. 55–56), authorized the Civil Service Commission to adopt and prescribe such special procedures as were felt necessary to govern recruitment in all positions in all departments and agencies, and provided that "Persons appointed solely by reason of [such] procedures * * * shall not thereby acquire a classified (competitive) civil-

[22] The examination consisted of two parts: (1) evaluation of qualifications, and (2) oral examination. In the cases of appointment to grades higher than P–5, the oral examination could be waived.

service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter."

On March 16, 1942, the Board of Legal Examiners amended Section 17.2 of its regulations to add subsection (g) which provided (7 F. R. 2201): "Effective March 16, 1942, all appointments to attorney and law-clerk trainee positions shall be for the duration of the present war and for six months thereafter unless otherwise specifically limited to a shorter period. *Such appointments shall be effected under E. O. 9063* * * *, and persons thus appointed will not thereby acquire a classified status * * *." (Italics added.) At the time subsection (g) was added, Section 17.2 was the only provision in the Board's regulations dealing with appointments to attorney positions.[23]

On January 30, 1943, the Board of Legal Examiners prescribed (Section 17.8; 8 F. R. 2141)[24] procedures governing the establishment of registers, and the Civil Service Commission established registers shortly thereafter. On April 20, 1943, the Board "revised and amended" its regulations (8 F. R. 5207). As amended, the regulations

[23] Section 17.1 "appointment from existing registers" had been revoked on August 6, 1941 (6 F. R. 4091). *Supra*, p. 31. Section 17.3 (6 F. R. 3579) recommended the establishment of law-clerk trainee positions. Section 17.4, 17.5, and 17.6 (6 F. R. 4181, 5799) dealt with transfers of attorneys.

[24] Section 17.7, added May 4, 1942 (7 F. R. 3853), dealt with transfers and promotions with increase in grade.

no longer contained any reference to "Procedure prior to the establishment of registers," for the obvious reason that registers had by then been established. The substance of what was formerly Section 17.2 (g) became subsection (g) of Section 17.1 ("Appointments") and read:

> All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942.

3. By Executive Order 9358, July 1, 1943 (8 F. R. 9175) "the administration of the civil service laws in their application to attorney positions" was vested in the Civil Service Commission. The Commission continued the regulations

of the Board of Legal Examiners in effect. Civil Service Acts, Rules and Regulations, Annotated (amended to October 31, 1943), p. 171. Respondents were not appointed to their positions until July 26, 1943 and August 1, 1943 (R. 3, 77).[25]

B. Tested against this history of the executive and administrative pronouncements bearing on the point, respondents' arguments that they acquired status are clearly untenable.

1. They first contend that Section 17.1 (g) of the Board's regulations (as revised and amended on April 20, 1943) (*supra*, p. 33) was intended to apply only to appointments "prior to the establishment of registers." They base their argument solely on the fact that the Board's war service regulation was originally promulgated on March 16, 1942 (7 F. R. 2201) as an additional subsection to Section 17.2 which at that time was entitled "Procedure prior to the establishment of registers." *Supra*, pp. 30–31. They explain its subsequent form, in Section 17.1 (g), on the theory that when the regulations were subsequently "republished * * * in a sort of connected code" (Elder Br., p. 56) the subtitle "Procedure prior to the establishment of registers" was unaccountably omitted.

We believe, however, that the regulation as originally promulgated in March 1942 plainly gov-

[25] Attorney positions were excepted from the competitive service effective May 1, 1947 (see *infra*, pp. 40–41).

erned "all appointments to attorney positions" after March 16, 1942, and its inclusion in the Section entitled "Procedure prior to the establishment of registers" is explained by the fact that, as noted above (p. 32), Section 17.2 was then the only section of the Board's regulations dealing with appointments. If there could be any doubt on that score, it was removed when the regulations were revised and amended in April 1943, and as amended omitted all reference to "Procedure prior to the establishment of registers." The omission was not, as respondents think, unaccountable, but was made for the obvious reason that registers had by that time been established. *Supra,* pp. 32–33. It verges on the frivolous to contend that Section 17.1 (g), the regulation of the Board of Legal Examiners in force at the time respondents were appointed, did not apply to their appointments.

2. Respondents secondly contend that only the Civil Service Commission, and not the Board of Legal Examiners, was authorized, under E. O. No. 9063 (February 16, 1942), to promulgate war service regulations and that the Board's regulations were therefore invalid. The answer is that, on the contrary, the Board's regulations were authorized by E. O. No. 9063, were issued after consultation with and with the approval of the Civil Service Commission, and were, in any case, ratified by a subsequent Executive order and

adopted by the Commission prior to respondents' appointments.[26]

The Board of Legal Examiners was created, by Executive Order No. 8743, "*in* the Civil Service Commission." Its regulations, determined in consultation with the Commission, were promulgated as Part 17 of the Commission's regulations. There is no evidence, and no reason for thinking any can be found, that the conditions motivating the President to authorize the Commission to promulgate special war service regulations were not present in the case of attorneys. Nor is there anything in E. O. No. 9063 which indicates that the Commission could not delegate part of its power to regulate all appointments during the emergency to the unit within the Commission set up to handle attorney appointments. That some such delegation was made seems evident from the fact that the Board's regulations specifically cite E. O. No. 9063 as authority: "Such appointments shall be effected under Executive Order No. 9063 * * * and persons thus appointed will not thereby acquire a classified status." Moreover, the Board's regulations coincided with those of the Civil Service Commis-

[26] We might also point out that even if the Board's regulations were invalid, it would not follow that respondents acquired competitive status. The proper result would appear to be that they were never properly appointed to the federal service at all.

sion governing appointment to other positions (7 F. R. 7725).

If further proof of the validity of the Board's war service regulations, as applied to respondents, is thought necessary, we believe it is supplied by two subsequent events: On August 20, 1942, Executive Order No. 8743 (creating the Board of Legal Examiners) was amended by Executive Order 9230 (7 F. R. 6665, 3 CFR Cum. Supp. 1201). As amended, subsection 3 (i) read in part: "Persons whose appointment was approved by the Board prior to March 16, 1942 * * * shall be eligible for a classified civil-servic status * * *. Effective March 16, 1942, all appointments to attorney and law clerk (trainee) positions shall be for the duration of the present war and for six months thereafter unless specifically limited to a shorter period." Regardless of the validity of the Board's regulations prior to E. O. No. 9230, there can be no question that after August 20, 1942, appointments to attorney positions could be only of the war service variety.

Finally, by Executive Order No. 9358 (8 F. R. 9175, 3 CFR, Supp. 1943, 30, July 1, 1943), the functions of the Board of Legal Examiners were vested in the Civil Service Commission. The Commission continued the Board's regulations in effect. Civil Service Acts, Rules and Regulations, Annotated (amended to October 31, 1943), p. 171. At the time of respondents' appoint-

ments, in July and August 1943, the Board's regulations were in every sense the regulations of the Civil Service Commission.

In summary, we submit that there is no substance to respondents' argument that they had acquired competitive status and were, consequently, improperly separated. The regulations in effect at the time of their appointments were valid and specifically prohibited the acquisition of status by such appointments. Nothing happened subsequent to their appointments which could confer such status on them. They were, therefore, without status at the time of their separation and were, under the Civil Service Commission "Retention Preference Regulations," properly classified in subgroup B–1 on the retention register.

III

RESPONDENTS' SEPARATION WAS IN ALL OTHER RESPECTS IN ACCORDANCE WITH LAW

Respondents make three other contentions which are, we believe, wholly without merit. They are dealt with briefly below.

1. Respondents contend that the separation notice of May 29, 1947, was in violation of Section 14 of the Veterans' Preference Act of 1944 (*infra*, pp. 44–45) in that it afforded them less than the full thirty days required by that statute. The notice was received by respondents on May 29, 1947, and informed them that they were to

be "separated, effective on or after June 30, 1947" (R. 44). Respondents' last day of active duty was to be June 6, 1947, and the notice further provided: "after your last day of active duty the remainder of the notice period will consist of your accrued annual leave and nonpay status thereafter" (R. 44). Respondents seek to construe the notice as notice of "furlough without pay," effective June 6, 1947.

It is difficult to understand how they propose to sustain that construction. Respondents were not furloughed without pay and it was never the intention of the Secretary to take such action. They were separated effective June 30, 1947, and the notice of separation was ample. After June 6, 1947, respondents continued on the rolls of their office and were apparently on annual leave (R. 46).[27]

Section 14 of the Veterans' Preference Act nowhere requires that persons about to be separated remain on active duty throughout the notice period. The Civil Service Commission Regulations require that an employee affected by a reduction-in-force be kept in active duty status for as much of the period as possible but expressly permit his being placed on annual leave for any part of the period, and, if his annual

[27] It has long been established that employees may be forced to take annual leave, without their consent, whenever such action is in the interest of the service. 19 Comp. Gen. 955, 28 Comp. Gen. 526.

leave is insufficient to cover the period, that he be carried on the rolls in a non-pay status. Civil Service Commission "Retention Preference Regulations," 5 C. F. R. (1949), Section 20.10. The requirements of those regulations were more than fulfilled in the case of respondents and their separations were upheld by the Commission (R. 62–63).

2. Respondents also contend that because attorney positions were excepted from the competitive service after May 1, 1947, it was impossible for any attorney to be classified in Group A on the retention register and, therefore, that the A–2 attorneys retained should have been classified in sub-group B–2 and separated before respondents. But the very regulations on which respondents rely (Section 20.3 of the "Retention Preference Regulations", 12 F. R. 2850) (see Elder Br. at p. 45) define Group A to include: "with respect to positions excepted from the Civil Service Act and rules * * * all employees currently serving under appointments without time limitation." So far as appears, the A–2 attorneys held appointments without time limitations and were properly classified on the retention register.

3. Respondents final contention is that "attorney positions have remained in the classified (competitive) civil service during all times since the issuance of Executive Order No. 8743 of

April 23, 1941." (Elder Br. at p. 45.) It is difficult to perceive to what purpose the argument is made. Even if respondents' hypothesis were true, they have never held an appointment making them eligible for classified status. In any case, the argument is not sound. The Ramspeck Act, 54 Stat. 1211, 5 U. S. C. § 631a (*supra*, p. 25), simply *authorized* the President to cover all positions in any agency into the classified service and that power was exercised, as to attorneys, by Executive Order No. 8743 (6 F. R. 2117). See page 30, *supra*. That Act did not impair the President's power, under R. S. 1753 (5 U. S. C. § 631), to "prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof."[28] Executive Order No. 9830, which excepted attorney positions from the competitive service (12 F. R. 1259, 1264), was entirely within the power of the President.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals for the District of Columbia Circuit was correct insofar as it upheld the validity of respondents' separation, and, for the reasons stated in our brief in

[28] That power was expressly continued in the President by the Civil Service Act of 1883, Section 7, 22 Stat. 406, 5 U. S. C. § 638.

No. 473, it is respectfully submitted that the judgment should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
MORTON LIFTIN,
ARTHUR W. MURPHY,
Attorneys.

APRIL 1951.

APPENDIX

1. Sections 12, 14 and 18 of the Veterans' Preference Act of 1944 (58 Stat. 387, 390, 391, as amended by the Act of August 4, 1947, 61 Stat. 723, 5 U. S. C. and 5 U. S. C., Supp. III, §§ 861, 863 and 867) provide:

SECTION 12.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies,

for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SECTION 14.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a per-

sonal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SECTION 18.

All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

2. Section 4 of the Act of August 23, 1912 (37 Stat. 413, 5 U. S. C., 1934 ed., § 648) provides:

SEC. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept

in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also proxide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

3. Sections 17.1 and 17.6 of the Regulations of the Board of Legal Examiners (8 F. R. 5207, 5 C. F. R. Cum. Supp. § 17.1 and 17.6) provide:

§ 17.1 *Appointments.* (a) If a person whose appointment to an attorney position was authorized by the Board prior to March 16, 1942, subject to later noncompetitive examination, fails to pass the examination, his appointment shall terminate within 30 days after notification by the Board to the department or agency in which he is employed, except that in cases of special emergency he may be retained, without acquiring civil service

status, for such longer period as the Board, in its discretion, deems necessary. A person whose appointment was authorized prior to March 16, 1942 and who passes a non-competitive examination acquires a classified civil service status six months from the date of his appointment, if there has been compliance with the provisions of Section 2.6 of this chapter, other than those provisions relating to recommendation and examination.

(b) Except as provided in paragraph (g) of this section, no person may be appointed to an attorney position unless he has passed a non-competitive examination prescribed by the Board or has his name listed on an attorney register applicable to the position to which he is appointed. The non-competitive examination will be given only to a person whose proposed appointment has been submitted to the Board by an appointing officer.

(c) The following qualifications will be required:

(1) *For appointment to Grade CAF–4.* Graduation from a recognized law school as defined by the Commission, to wit, a law school authorized to confer the Bachelor or higher degree in law, which requires residence work. No person shall be eligible for appointment to this position who has failed a bar examination since his graduation from law school and who has not subsequently passed such an examination, or who has, except for good cause shown, failed to take a bar examination within one year of graduation from law school.

(2) *For appointment to Grade P–1 and higher.* Admission to the bar and the following professional experience or its

equivalent: P–1, none; P–2, one year; P–3, eighteen months; above P–3, three years. In judging the equivalent of professional experience, special qualifications may be taken into consideration.

(d) Non-competitive examinations shall be conducted by or under the supervision of examining committees of three members to be appointed by the Chairman of the Board or pursuant to his direction and such committees shall determine the eligibility or ineligibility of the candidate. The determination shall be based upon (1) the record and experience of the candidate and (2) an oral examination. The oral examination may be waived in the case of appointments above P–5 and in the case of any war service appointment, if the examining committee is satisfied, without regard thereto, that the candidate is eligible.

(e) The determination of the examining committee in non-competitive examinations shall be final, except that within fifteen days after notification of failure an unsuccessful candidate may petition the Board to review the determination. Such review is discretionary and will be granted only for good cause shown.

(f) Examinations shall be directed to determining whether the candidate possesses the competence requisite for the professional grade generally rather than for any particular position within the grade.

Notwithstanding the foregoing provision a person employed in a position other than an attorney position may be approved for an attorney position in the same agency in a grade not higher than P–3 provided (1) that he meets the minimum require-

ments prescribed in paragraph (c) of this section; (2) that his assignment will be limited to work which calls primarily for knowledge of the particular agency; (3) that his experience in the agency especially qualifies him for the type of work for which he is proposed; and (4) that the examining committee is satisfied of his ability to perform competently the type of work to which he will be assigned. Persons thus approved for particular positions shall be eligible to acquire qualified Civil Service status as attorneys. Persons who acquire or who are approved for qualified Civil Service status as attorneys may not be reassigned to a different type of work or transferred to another agency without first passing such competitive or non-competitive tests as the Board may prescribe. Promotion to any grade above P–3 shall *per se* be deemed reassignment for the purpose of this section.

(g) All appointments to attorney and law-clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in

other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942.

* * * * *

§ 17.6 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and of the supplements thereto shall constitute the certification of the eligibles included. The register, together with pertinent information concerning the eligibles which the Board will supply, shall be available in full to appointing officers, who may make selections for appointment from among those included, subject to the Board's stated minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add

to a register others who have qualified through examination, in substitution for those who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon register for cause arising either before or after his original certification. In case the life of a register is extended, the eligibles remaining upon it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

4. Executive Order No. 8743, April 23, 1941 (6 F. R. 2117, 3 C. F. R. Cum. Supp. 927) provides, in pertinent part:

> By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "Extending the Classified Executive Civil Service of the United States" (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows;
>
> SECTION 1. All offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of section 1 of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.
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> * * * * *
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> SECTION 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No. 118, 77th Congress) appointed by Executive

Order No. 8044 of January 31, 1939, it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to as the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and the Principal Legal Examiner of the Civil Service Commission, as members *ex officio*, and nine members to be appointed by the President, five of whom shall be chosen from the chief law officers of the Executive departments, agencies, or corporate instrumentalities of the Government, two from the law-teaching profession, and two from attorneys engaged in private practice. The President shall designate the chairman of the Board. Five members shall constitute a quorum, and the Board may transact business notwithstanding vacancies thereon. Members of the Board shall receive no salary as such, but shall be entitled to necessary expenses incurred in the performance of their duties hereunder.

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement,

appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys, in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided,* That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule VI shall be appropriately designated thereon.

(g) Any person whose name has been placed upon three registers of eligibles covering positions of the same grade, and who has not been appointed therefrom,

shall not thereafter be eligible for placement upon any subsequently established register covering positions of such grade.

(h) The eligibles on any register for attorney positions shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census, and the Commission shall certify to the appointing officer for each vacancy all the names on the appropriate register which meet the apportionment requirements: *Provided,* That whenever the Board shall be of the opinion that apportionment of eligibles on any register for attorney positions is not warranted by conditions of good administration, it shall so notify the Commission, which shall thereafter certify all the persons on such register to the appropriate appointing officer. The appointing officer shall make selections for any vacancy or vacancies in attorney positions from the register so certified, with sole reference to merit and fitness.

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointment of a person who has passed a noncompetitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for a classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided,* That the noncompetitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) The Commission with the approval of the Board shall appoint a competent person to act as Secretary to the Board; and the Commission shall furnish such further clerical, stenographic, and other assistants as may be necessary to carry out the provisions of this section.

(l) The Civil Service Rules are hereby amended to the extent necessary to give effect to the provisions of this section.

* * * * *

5. Executive Order No. 9063, February 16, 1942 (7 F. R. 1075, 3 C. F. R. Cum. Supp. 1091) provides:

Whereas millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and

Whereas it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons:

Now, therefore, by virtue of the authority vested in me by section 2 of the

Civil Service Act (22 Stat. 404), it is hereby ordered as follows:

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal establishment. The procedures and regulations thus adopted and prescribed shall be binding with respect to all positions affected thereby which are subject to the provisions of the Civil Service Act and Rules.

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 16, 1942.

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